

~~EXHIBIT 1~~**In the West Virginia Supreme Court of Appeals**

State *ex rel.* The Tucker County Solid
Waste Authority,

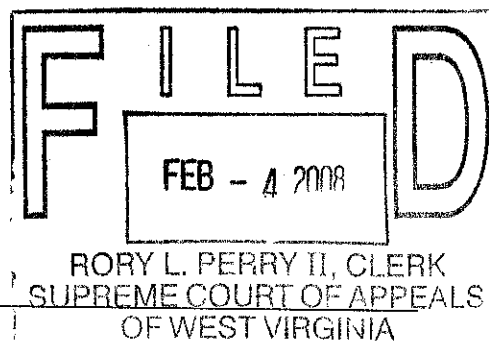
Petitioner

v.

Case No. 33809

West Virginia Division of Labor,

Respondent.



**Memorandum of Law of
West Virginia State Building and Construction Trades Council, AFL-CIO
in Opposition to Petition for Writ of Prohibition, or
in the Alternative the *Amicus* Brief of the
West Virginia State Building and Construction Trades Council, AFL-CIO**

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Introduction and Nature of Proceeding

On or about November 16, 2007 the Petitioner requested that this Court issue a Writ of Prohibition preventing the West Virginia Division of Labor ("Division") from enforcing the prevailing wage law through an administrative proceeding against it. Following a Response and Memorandum filed by the Division, on January 10, 2008 this Court Ordered the Division to appear in its courtroom on February 26, 2008 to show cause, if any, why a writ of prohibition should not be awarded against the division as prayed for by the Petitioner.

The West Virginia State Building and Construction Trades Council, AFL-CIO has filed this day with this Court a Motion for Leave of this Court to Intervene, or in the Alternative to File an *Amicus* Brief. This is the Council's Memorandum of Law in Opposition to the Petition for a Writ of Prohibition or in the alternative this is the Council's *Amicus* Brief.

Response to Assignments of Error by the Petitioner

The Petitioner in this matter cites to two "Assignments of Error" in bringing this Petition to this Court. The Petitioner argues that the Division of Labor exceeded its legitimate authority when it applied the West Virginia Prevailing Wage Act to employees of a public authority and when it applied the Act to work that was never let to contract. (Petitioner Memorandum, page 9) The Council contends that the Petitioner is incorrect on both assignments and will briefly address each purported error. At best, as discussed below, the record is inadequate for this Court to issue the requested Writ.

Points and Authorities Relied Upon

State Statutes

W. Va. Code § 21-5A-1	3, 8
W. Va. Code § 21-5A-2	3, 9
W. Va. Code § 21-5A-3	9
W. Va. Code § 22C-4-1, <i>et seq.</i>	5
W. Va. Code § 5-22-1, <i>et seq.</i>	4, 5, 7

State Cases

<u>Affiliated Construction Trades Foundation v. University of West Virginia Board of Trustees</u> , 210 W.Va. 456, 557 S.E.2d 863 (2001)	11
<u>State ex rel. E.D.S. Fed'l Corp. v. Ginsburg</u> , 163 W.Va. 647, 259 S.E. 2d 618 (1979) ...	11
<u>Pioneer Co. v. Hutchinson</u> , 159 W.Va. 276, 220 S.E.2d 894 (1975)	11

State Regulations

54 CSR 5-4.9	6
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Federal Cases

<u>United States v. Binghamton Constr. Co.</u> , 347 U.S. 174, 74 S.Ct. 438 (1954)	11
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Other Authorities

62 W. Va. Op. Atty. Gen. No. 4 (1986)	6
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Discussion of the Law and Argument

Application of the prevailing wage to work that was not "let to contract" - The bulk of Petitioner's argument before this Court is the assignment of error that the Division exceeded its legitimate powers when it applied the prevailing wage to the work at issue because the work at issue was never "let to contract" because "[w]ork not let to contract is not covered by our prevailing wage laws." (Petitioner Memorandum, page 14. See also page 17). If this Court were to adopt the Petitioner's argument on this issue it would be permitting one violation of law to be used as an exemption from another. A simple review of the law of this State demonstrates the fallacy of the Petitioner's argument.

The West Virginia prevailing wage statute provides that workmen employed by or on behalf of any public authority that are engaged in the construction of public improvements shall be paid the prevailing wage. W. Va. Code § 21-5A-2 The statute defines the term "construction" broadly to include "any construction, reconstruction, improvement, enlargement, painting, decorating or repair" of any public improvement, but specifically excludes from the term "construction" work on "temporary or emergency repairs." W. Va. Code § 21-5A-1(2) The prevailing wage statute defines "public improvement" broadly as "all buildings, roads, highways, bridges, streets, alleys, sewers, ditches, sewage disposal plants, waterworks, airports and all other structures upon which construction *may be let to contract* by the state of West Virginia or any political subdivision." W. Va. Code § 21-5A-1(4) (emphasis added) It is on the phrase "let to contract" that this portion of the Petitioner's argument rests. The Petitioner argues that if the work is not "let to contact" the work cannot be covered by the prevailing wage law. In the

instant matter, the Petitioner argues that the work was not “let to contract”, rather the Petitioner employed, on a temporary basis, workers to undertake the work at issue. Having not “let to contract” the work at issue, the Petitioner concludes the state’s prevailing wage law cannot and does not apply to this work.

The Petitioner, however, completely ignores another critical law in the area of public contracts and public construction. As this Court is well aware, it is the law of this State that, with limited exceptions, *all* public construction projects exceeding \$25,000 in total cost *must be put out for public bid*. W. Va. Code § 5-22-1, *et seq.* The wording of the law could not be more clearly stated:

(c) The state and its subdivisions shall, except as provided in this section, solicit competitive bids for every construction project exceeding twenty-five thousand dollars in total cost. W. Va. Code § 5-22-1 (c)^{1,2}

The referenced exceptions are equally clearly stated:

(i) Nothing in this section shall apply to:

(1) Work performed on construction or repair projects by regular full-time employees of the state or its subdivisions;

(2) Prevent students enrolled in vocational educational schools from being utilized in construction or repair projects when the use is a part of the student's training program;

(3) Emergency repairs to building components and systems. For the purpose of this subdivision, the term emergency repairs means repairs that if not made immediately will seriously impair the use of building components and systems or cause danger to those persons using the building components and systems; and

(4) Any situation where the state or a subdivision thereof reaches an agreement with volunteers, or a volunteer group, whereby the governmental body will provide construction or repair materials, architectural, engineering, technical or any other

¹ The section then provides that vendors that are debarred may not bid and that all bids must include a valid bid bond or surety.

² W. Va. Code 5-22-1(b)(2) defines “state and its subdivisions” as “the state of West Virginia, every political subdivision thereof, every administrative entity that includes such a subdivision, all municipalities and all county boards of education.”

professional services and the volunteers will provide the necessary labor without charge to, or liability upon, the governmental body. West Virginia Code § 5-22-1(i)

While the record in this matter is slight, the stipulated facts in the instant matter appear to demonstrate that there were no student vocational education training programs involved, there were no emergency repairs involved and there were no volunteers involved. It is clear that the employees involved in the construction at issue were "at all times employed by the TCSWA [the Petitioner] on a temporary basis." (See, Joint Stipulation of Facts at ¶ 12). Therefore, there were no "regular full-time employees" involved in the construction at issue. Thus, it appears that none of the clearly stated exemptions to the competitive bidding statute apply to the instant matter.

It also appears that the total cost of the construction at issue in this matter exceeded the \$25,000 statutory floor in that the total amount of prevailing wages due was stipulated to be \$99,880.15.³ Again, while the record is incomplete, it is important to note that the construction at issue was only one portion of a larger project, a second part of which was let to contract by the Petitioner and was stipulated to be within the Prevailing Wage Act.⁴

In addition, there is nothing in the record to indicate that the construction work at issue was in some other way exempt from the State's competitive bidding law.⁵ Thus, it appears that

³ In addition, a simply conservative mathematical equation reaches the same conclusion. The Joint Stipulated Facts state the following: there are ten (10) workers at issue in this matter; these individuals were hired between May of 2003 and August of 2003 and were terminated between November 2003 and January 2004. If one were to assume that the workers involved, working only from August 2003 through November 2003, made only \$6.00/hour, and if the workers worked 40 hours a week, the four month period would result in 6400 work hours and the total compensation would be \$38,400. Of course, this is only an estimate and the facts on this issue could be developed in front of the ALJ at the Division of Labor.

⁴ Information about this other portion of the project is found in the Joint Stipulation of Facts at ¶ 15 which states, "TCSWA entered into a contract with Geo-Synthetics, Inc. to install a plastic liner in the new landfill cell. There is no dispute concerning the prevailing wages that were paid under this contract."

⁵ The Petitioner was established and operates pursuant to W. Va. Code § 22C-4-1, *et. seq.* There is nothing in that Article which creates such an exemption. While the record appears silent on the source of the funds utilized for the work at issue, the Council would note that the regulations of the State Waste Management Board regarding the

the State's competitive bidding law applied to the public construction work at issue in this matter and that the Petitioner violated the state's competitive bidding law by not putting the construction at issue out to bid. By instead hiring temporary employees to undertake the work, the Petitioner is arguing that the project was therefore never "let to contract" (which it would have been had it been put out for bid) and, therefore, the prevailing wage law does not and cannot apply. Considered in the context of the competitive bidding law, the impact of granting the pending Writ would be to allow the Petitioner to avoid the prevailing wage law due to the fact that the Petitioner violated the competitive bidding law. Even if one were to agree, and the Council does not, that the application of the prevailing wage law is somehow exclusively tied to construction being "let to contract", it does not follow that failing to comply with the competitive bidding law should be a free pass to the prevailing wage law. The sole reason that the construction work at issue was not "let to contract" was that the Petitioner decided not to -- in apparent direct contradiction to the law. The work itself was work that is without doubt work that is construction work on a public improvement that would have been let to contract if the Petitioner had complied with the competitive bidding law.

Let us be clear, the Council is not arguing that a public entity is not permitted to self-perform construction. The law permits public entities to self-perform construction with current⁶

Disbursement of Grants to Solid Waste Authorities requires the solicitation of "sealed bids for all construction-related contracts or purchases in accordance with the governing purchasing procedures and guidelines. Any attempts by the applicant to circumvent this requirement by segregating the project into sections each having an estimated value of less than the amount requiring sealed bids may be cause for termination of the agreement." 54 CRS 5-4.9

⁶ The Attorney General's Opinion referenced by the Division states that the "public authority may not hire new personnel to perform such capital improvements; nor may the public authority evade the law by hiring new personnel to do the work of regular employees and transfer existing employees to make such capital improvement." (62 W.Va. Op. Atty. Gen No. 4 (1986)). The Council contends that the AG's reasoning is completely consistent with the law.

regular full-time employees.⁷ In such an instance the work would be *properly* not let to contract, the public entity would not be required to bid the work and the prevailing wage law would not apply. However, in the instant matter it appears that the work was *improperly* not let to contract due to the fact that the work at issue does not fall within any of the exceptions to the competitive bidding law as evidenced by the fact that the Petitioner admittedly utilized temporary employees who were newly hired to undertake the specific work at issue in this matter⁸ and were terminated after the completion of the work.⁹

What is clear is that the parties in this matter have failed to consider, brief or present to this Court, the critical issue related to the role of this State's competitive bidding statute (W. Va. Code § 5-22-1, *et seq.*) on the issues before this Court. The Council contends that, unless and until these issues of fact are determined and the application of the competitive bidding law is considered, this Court cannot fully consider this matter.

It appears from the record and the law, given the stipulated facts that, in that public entities are mandated to submit projects such as the instant matter for public bid, in the instant matter the apparent improper failure to let the construction to contract requires that the workmen involved be paid the prevailing wage. (See below).

In either instance the Petitioner's purported error must fail and the Division's application of the law must be upheld.

⁷ In addition, the public entity can utilize job students enrolled in vocational education, make emergency repairs or reach an agreement with volunteers all of which is permitted by law. W. Va. Code § 5-22-1(i)

⁸ The Joint Stipulation of Facts states that the ten individuals were hired on a "temporary basis" and were hired "to excavate an area where the new cell in the landfill was going to be located and to truck the excavated dirt to the existing areas of the landfill." (Joint Stipulation of Facts at ¶ 12).

⁹ The Joint Stipulation of Fact states that "most" of the temporary employees at issue were terminated between November 2003 and January 2004. It states that "some" of the employees were retained as permanent employees. (*Id.* at ¶ 13).

Application of the Prevailing Wage Law to Public Employees - As noted above, the Petitioner's remaining assignment of error concerns the allegation that the Division exceeded its legitimate powers "when it applied the West Virginia Prevailing Wage Act to the employees of a public authority." (Petition at page 9). The Petitioner argues that the West Virginia Prevailing Wage law "clearly excludes employees of a public authority from application" of the prevailing wage. (Petitioner Memorandum at page 12). The Petitioner misconstrues the law. One need only look at the wording of the statute itself.

The prevailing wage statute defines the term "employee" in the negative stating that term "shall not be construed to include such persons employed or hired by a public authority on a regular or temporary basis or engaged in making temporary or emergency repairs." W. Va. Code § 21-5A-1(7) Thus, when the Act utilizes the term "employee" the Act explicitly excludes regular or temporary employees of a public authority or those employees of a public authority that are engaged in the making of temporary or emergency repairs.

The prevailing wage statute utilizes the term "employee" only one time – within the definition of construction industry. It defines the term "construction industry"¹⁰ as "that industry, which is composed of *employees* and employers engaged in construction of buildings, roads, highways, bridges, streets, alleys, sewers, ditches, sewage disposal plants, waterworks, airports, and all other structures or works whether public or private on which construction work as defined in subsection (2) of this section is performed." W. Va. Code § 21-5A-1(5) (Emphasis added) Thus, employees, hired by a public authority, are not considered to be within the "construction industry" according to this Act.

¹⁰ The statute also exempts from the term "construction" work that constitutes "temporary or emergency repairs." (West Virginia Code § 21-5A-1(2)).

The term "construction industry" is utilized only one time in the Act. It is included in W. Va. Code § 21-5A-3 regarding how "fair minimum rate of wages" are determined. The section states that the term "fair minimum rate of wages" shall be the "rate of wages paid in the locality in this state as hereinbefore defined to the majority of workmen, laborers or mechanics in the same trade or occupation in the construction industry." Thus, in that employees of public authorities are not considered to be within the construction industry, the wages paid to such employees cannot be used to calculate what constitutes a fair minimum wage.

While the Act does not utilize the term "employee" anywhere else in its provisions, the Act does, however, state that it is the policy of the State of West Virginia that the prevailing wage "shall be paid to all workmen *employed by* or on behalf of any public authority engaged in the construction of public improvements." W. Va. Code § 21-5A-2 (Emphasis added) Thus, the policy of this State is that workmen employed by or on behalf of public authorities must be paid the prevailing wage.

A straightforward reading of the law, therefore, makes it clear that it simply is incorrect to state, as the Petitioner repeatedly does, that, "[t]he prevailing wage statute states explicitly that a public authority's own employees are not covered by the statute." (Petition at page 13).¹¹ The Act itself says no such thing. When one applies the wording of the statute, the Act states that "regular or temporary" *employees* of public authorities are not considered to be included in the "construction industry" and, therefore, the rate of wages paid to such employees are not to be included in the calculation used to determine the fair minimum wages. However, any "workmen" that are "employed by or on behalf of any public authority" shall be paid the prevailing wage if they are "engaged in the construction of public improvements." The

¹¹ The Petitioner states on page 13 that "the employment relationship between the public agency and its employees is excluded by the operative provisions of the statute."

"construction" included within the reach of the prevailing wage does not include "temporary or emergency repairs."

The wording of the statute simply does not prohibit the payment of prevailing wages to employees of public authorities in every instance. Again, as discussed above, the Council is not arguing that public entities are prohibited from self-performing certain construction work or that public employees must be paid the prevailing wage when undertaking construction work on public improvements. Rather, as discussed above, when a public entity *properly* determines not to let contract construction work, then it need not place the work out for public bid nor pay the prevailing wage. However, as in the instant matter, when a public entity *improperly* decides not to let to contract construction work on a public improvement (in the instant matter by violating the competitive bidding law), the law permits the payment of prevailing wages to the employees of such a public entity.

This portion of the Petitioner's argument must fail. This is particularly true given the Petitioner's apparent violation of the State's competitive bidding law (as discussed above). In such an instance, the application of the prevailing wage in such a circumstance is clearly warranted.

Conclusion

It is evident that, given the wording of the statutes at issue in this matter, the Division has not exceeded its legitimate powers by applying the prevailing wage law to the facts in the instant matter. It is evident, given the wording of the statute, that there is no basis for this Court to issue a Writ of Prohibition as prayed for by the Petitioner. It is also evident that given the limited nature of the record before this Court and the absence of the existing Parties to consider the

impact of the State's competitive bidding law on the instant matter that the Petition before this Court must not be granted.

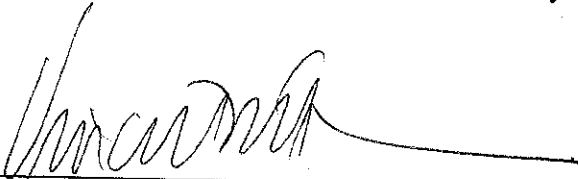
This is particularly true in that the matter currently before this Court appears to constitute another of a number of schemes that some public entities utilize in an effort to avoid their responsibilities under the competitive bidding and prevailing wage laws. These public entities either fail to comprehend or choose to ignore the public policy behind these laws – the protection of the spending of the public's funds. The granting of a Writ in this matter would act as a precedent for other public entities to look to in their efforts to avoid procurement laws and regulations.

The competitive bidding and prevailing wage statutes were enacted in an attempt to protect against the expenditure of the public's funds in a manner that violates the public policy of the state or in a manner that benefits certain parties rather than the public. It has long been the policy of government and law that the expenditure of the public funds are, "not for the benefit of contractors" but to "protect employees from substandard wages" United States v. Binghamton Constr. Co., 347 U.S. 174, 74 S.Ct. 438 (1954). See also Affiliated Construction Trades Foundation v. University of West Virginia Board of Trustees, 210 W.Va. 456, 557 S.E.2d 863 (2001) Likewise, it has long been the public policy that competitive bidding statutes have been enacted for the protection and benefit of the public and the public's coffers. Pioneer Co. v. Hutchinson, 159 W.Va. 276, 220 S.E.2d 894 (1975) overruled on other grounds by State ex rel. E.D.S. Fed'l Corp. v. Ginsburg, 163 W.Va. 647, 259 S.E. 2d 618 (1979) The Writ before this Court, if granted, would appear to reward the Defendant for failing to comply with these important laws which are fundamental building blocks of this State's public policy.

The Council, therefore, urges this Court to reject this Petition and to permit the Division to protect the public by enforcing the laws of this State.

Respectfully submitted this 18 day of February, 2008.

The West Virginia State Building and
Construction Trades Council, AFL-CIO
By Counsel,

A handwritten signature in dark ink, appearing to read 'Vincent Trivelli', with a long horizontal line extending to the right.

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